IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 262 OF 2001

Shreeji Town Planners Pvt. Ltd. ..Appellants.

Vs.

Rainbow Construction & Ors. ..Respondents.

Mr.A.S.Khandeparkar i/b.Gaonkar & Co. for Appellants.

Mr.Girish Godbole i/b. Utangale & Co. for respondent Nos.2 to 5.

Mr.S.M.Tendulkar for respondent Nos.6 & 7.

CORAM: V.C.DAGA, J.

DATE: 30TH AUGUST, 2004.

P.C.

1. Heard rival parties. This appeal is directed against the order dated 12th December, 2000 in Notice of Motion No.5080 of 2000 in S.A. Suit No.5609 of 2000 whereby; Notice of Motion came to be rejected and the interim injunction in which the appellants / plaintiffs were claiming to restrain and prevent the respondent Nos.2 to 5 from taking any steps which will result in obstructing their ingress and egress to the suit property bearing C.T.S.No,1254, 1255 & 1256, shown in red colour annexed to the plaint as Exhibit B, came to be rejected.

. The appellants/plaintiffs have also claimed a declaration that the respondents/defendant Nos.2 to 5 have no right to prevent them from using the approach road to approach their property and, by way of consequential relief, they also claimed permanent prohibitory injunction to restrain them from obstructing plaintiffs and/or persons claiming through them from using the approach road.

2. The above controversy between the parties centres around the right of way which the plaintiffs, the appellants herein; claimed to have acquired under an agreement dated 9th January, 1996 from the first respondent. This right of way is denied to the appellants / plaintiffs on the various grounds, like it may damage the septic tank owned by the respondent Nos.2 to 5 which is below the earth abutting the said approach road; that the use of the approach road will damage the building situated on other side of the road, in which one of the flats of the respondents 2 to 5 are located; that the compound wall will get damaged including the water pipeline and drainage line used by them.

3. All the above submissions were also placed

before the trial Court. The trial Court, ultimately, rejected Notice of Motion by the impugned order.

4. That during the pendency of the appeal the learned Single Judge of this Court vide order dated 17th April, 2001 was pleased to direct the parties to obtain opinion from qualified Architect as to the manner in which the plaintiffs/appellants can be allowed to use the road without causing any damage to the property of the respondent Nos.2 to 5. Both parties to the appeal had agreed that one Mr.Sanjay B. Shah, Architect be appointed to examine the area and to give his proposal with his opinion as to the manner in which the appellants can make use of the approach road without causing damage to the property of respondent Nos.2 to 5.

5. In pursuance of the aforesaid order Architect was appointed by this Court. He has furnished his report. The same is on record.

6. During pendency of this appeal by way of ad-interim order the appellants were prohibited from laying down any pipe line or doing any construction work over the road in question. However, they were allowed to use the road without causing damage to the

compound wall of the respondent Nos.2 to 5. This order has operated satisfactorily for a period of more than three years.

7. Mr.Khandeparkar learned Counsel appearing for the appellants submits that in view of the document of purchase, whereby right of way was purchased by Rajendra Kale, Smt.Rashmi Kale, Santosh Kale and Sonia Kale from the M/s.Rainbow Constructions, the appellants are entitled to use their property and lay down pipeline through the said approach road. He further submits that the appellants would construct or lay down pipeline in such a way that it would not cause any damage to the property of respondent Nos.2 to 5. He further submits that the appellants would take all care and precaution to prevent any damage to the property of any of the neighbours. On this assurance to this Court, he prayed for an order permitting the appellants to lay down the pipeline the absence of which is causing lot of problems for the occupants in the flat located in the scheme developed by the appellants / plaintiffs.

8. Per contra Mr.Godbole appearing for the respondents / defendant Nos.2 to 5 submits that the appellants are not entitled to claim any relief beyond

the scope of prayer clause (a) of their Notice of Motion. He tried to demonstrate that the prayers made were restricted. He submits that nothing is on record to indicate as to how the plaintiffs are claiming their rights with respect to the right of way, especially, when they are not party to the document of purchase. He, thus, prayed for dismissal of appeal with costs.

CONSIDERATION

9. Having heard rival parties, it is no doubt true that the prayer clause does not make reference to the interim relief with respect to the right to lay down any pipeline over the approach road. However, considering the nature of dispute this appeal can be disposed of on a narrow ground.

10. It is not in dispute that order dated 17th April, 2001 passed by the previous Bench has operated to the satisfaction of the parties. The adjoining property developed by the plaintiffs had no access from the main D.P. road for almost three years. In the circumstances, considering the location of the property the plaintiffs/appellants appear to have purchased one strip to use it as access to their property and wanted to lay down pipeline to clear waste water. On being

obstructed by the defendants/respondent Nos.2 to 5, they applied for an interim injunction which came to be rejected. During the pendency of this appeal, limited interim relief was granted by this Court in their favour which operated for almost 3 years from the date of the order. The said interim relief, in my opinion, needs to be made operative during the pendency of the suit on the same terms with some clarification.

11. So far as the right to lay down pipeline for taking out waste is concerned, it would be open for the appellants to take out Notice of Motion for this relief as the Notice of Motion under consideration does not pray for such relief. In the event of such fresh Notice of Motion, it would be open for the respondents to defend it on its own merits. All rival contentions in this behalf are kept open for being decided by the trial Court in the event of such fresh Notice of Motion.

12. So far as the question of the validity of the impugned order is concerned, considering the fact that interim order passed by this Court satisfactorily operated for a period of 3 years and taking into account the location of the property of the appellants and document of purchase giving rise to the prima facie

case and considering the urgent need to have some relief, the impugned order needs to be set aside by allowing the interim order dated 17th April, 2001 to operate during the pendency of suit. The respondent Nos.2 to 5 are restrained from in any manner obstructing appellants / plaintiffs right of ingress and egress by making use of the road in question during the pendency of the of the suit.

13. In the result appeal is allowed with no order as to cost.

7. In view of the disposal of this appeal, no further orders on the civil applications are necessary. Civil applications are disposed of.

8. Parties to act on an ordinary copy of this order duly authenticated by the Associate/C.S.

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